Supreme Court, U.S.
FILED
NOV 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-665

DOMINGO ROQUE MOLINA,

Petitioner,

vs.

PAUL T. RICHARDSON, JOHN H. GIBSON and THE CITY OF LOS ANGELES,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

BURT PINES
City Attorney
JOHN T. NEVILLE
Sr. Assistant City Attorney
MICHAEL K. FOX
Deputy City Attorney
DANIEL U. SMITH
Deputy City Attorney

1700 City Hall East
200 North Main Street
Los Angeles, CA 90012
(213) 485-3626

Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-665

DOMINGO ROQUE MOLINA,

Petitioner,

vs.

PAUL T. RICHARDSON, JOHN H. GIBSON and THE CITY OF LOS ANGELES,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

BURT PINES
City Attorney
JOHN T. NEVILLE
Sr. Assistant City Attorney
MICHAEL K. FOX
Deputy City Attorney
DANIEL U. SMITH
Deputy City Attorney

1700 City Hall East
200 North Main Street
Los Angeles, CA 90012
(213) 485-3626

Attorneys for Respondents

TOPICAL INDEX

	Page
Table of Authorities	ii
STATUTORY PROVISIONS INVOLVED	1
REASONS FOR DENYING THE WRIT	2
I PETITIONER HAS GROSSLY OVERSTATED THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER CIRCUITS	2
II THE LACK OF JURISDICTION OVER THE CITY OF LOS ANGELES DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION ON THE RECORD OF THIS CASE	10
A. Petitioner Failed To Show That His Ability To Recover On His Judgment Is Impaired By The Lack of Jurisdiction Over the City	11
B. Even If the City Were Subject To the Court's Jurisdiction Under Section 1331, Petitioner Has Not Shown Any Wrongdoing of the City That Would Create Liability Against The City, and Respondeat Superior Does Not Support Liability in Civil Rights Litigation	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Afro-American Patrolmen's League, Inc. v. Conlisk, 424 U.S. 912 (1976)	9
Amen v. City of Dearborn 532 F.2d 554 (6th Cir. 1976)	8
Beard v. Robinson 563 F.2d 331 (7th Cir. 1977)	4
Bethea v. Reid 445 F.2d 1163 (3d Cir. 1971)	5
Brault v. Town of Milton 527 F.2d 730 (2d Cir. 1975)	5
Bur v. Gilbert 415 F.Supp. 335 (E.D. Wis. 1976)	14
Calvin v. Conlisk 520 F.2d 1 (7th Cir. 1975) cert. denied, sub-nom.	9
City of Kenosha v. Bruno 412 U.S. 507 (1973)	9
Cleveland v. Albaugh No. 78-224 (6th Cir. 1978)	4
Cox v. Stanton 529 F.2d 47 (4th Cir. 1975)	5
Delaney v. Dias 415 F.Supp. 1351 (D. Mass. 1976)	14
Dist. of Columbia v. Carter 409 U.S. 418 (1973)	3

	Page
Everett v. City of Chester 391 F.Supp. (E.D. Pa. 1975)	14
Fine v. City of New York 529 F.2d 70 (2d Cir. 1975)	5
Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975)	7
Gagliardi v. Flint 564 F.2d 112 (3d Cir. 1977)	8
Gambling v. Cornish 426 F.Supp. 1153 (N.D. Ill. 1977)	14
Gentile v. Wallen 562 F.2d 193 (2d Cir. 1977)	7
Hanna v. Drobnick 514 F.2d 393 (6th Cir. 1975)	7
Hostrop v. Bd. of Jr. College Dist. 523 F.2d 569 (1975)	6
Jamison v. McCurrie 565 F.2d 483 (7th Cir. 1977)	7
Jennings v. Davis 476 F.2d 1271 (9th Cir. 1973)	14
Lewis v. D.C. Dept. of Corr'ns. 533 F.2d 710 (D.C. Cir. 1976)	3
Mahone v. Waddle 564 F.2d 1018 (3d Cir. 1977)	8
Matherson v. Long Island State Park Comm'n. 442 F.2d 566 (2d Cir. 1971)	7

	Page
McDonald v. State of Illinois 557 F.2d 596 (7th Cir. 1977) cert. denied 434 U.S. 966 (1977)	6
McNally v. Pulitzer Pub. Co. 532 F.2d 69 (8th Cir. 1976) cert. denied, 429 U.S. 855 (1976)	4
Monell v. Dept. of Soc. Servs. ___U.S.___, 98 S.Ct. 2018 56 L.Ed.2d 611 (1978)	Passim
Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)	9, 10
Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974)	8
Owen v. City of Independence 560 F.2d 925 (8th Cir. 1977)	6
Payne v. Government of Dist. of Columbia, 559 F.2d 809 (D.C. Cir. 1977)	3
Roane v. Callisburg Ind. Sch. Dist. 511 F.2d 633 (5th Cir. 1975)	7
Rotolo v. Borough of Charleroi 532 F.2d 920 (3d Cir. 1976)	8
Taken Alive v. Litzau 551 F.2d 196 (9th Cir. 1977)	14
Williams v. Horvath 16 Cal.3d 834 (1976)	12

	Page
Williams v. Howard University 528 F.2d 658 (D.C. Cir. 1976)	4

Statutes

California Government Code § 825	
§ 825	1, 11
28 U.S.C. § 1331	Passim
42 U.S.C. § 1983	5, 14, 15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-665

DOMINGO ROQUE MOLINA,

Petitioner,

vs.

PAUL T. RICHARDSON, JOHN H. GIBSON and THE CITY OF LOS ANGELES,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in the Petition, this case involved California Government Code § 825, which provides in pertinent part:

> If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring withir the scope of his employment . . . the public

entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

REASONS FOR DENYING THE WRIT

I

PETITIONER HAS GROSSLY OVERSTATED THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER CIRCUITS

Petitioner has cited 26 decisions from other circuits in an attempt to establish that "the Circuit Courts are in disarray" on the question of jurisdiction over a municipality under § 1331. Petition, p. 7.

However, by conveniently ignoring the holding of almost every case cited, petitioner has vastly overstated the extent of the conflict among the circuits on this question. A careful reading of the decisions cited by petitioner discloses that:

(a) eleven of the cases cited are simply not relevant to the issue of § 1331 jurisdiction over the City of

Los Angeles:

(b) ten of the decisions assert jurisdiction on grounds similar to those expressed by this Court in Monell v. Dept. of Social Services, ___U.S.___, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), but since a Monell-type situation is not presented in this case, those decisions are not in conflict with the decision below.

(c) the suggestion in four decisions that jurisdiction may be asserted under § 1331 is dictum;

(d) only one decision remains that is directly in conflict with the ruling below.

(A) Decisions Not Relevant To Section 1331 Jurisdiction Over The City Of Los Angeles:

Dist. of Columbia v. Carter, 409 U.S. 418 (1973);

Payne v. Government of Dist. of Columbia, 559 F.2d 809 (D.C. Cir. 1977);

Lewis v. D.C. Dept. of Corrections, 533 F.2d 710 (D.C. Cir. 1976);

Williams v. Howard University, 528 F.2d 658 (D.C. Cir. 1976).

Because the District of Columbia is not a "State or Territory" within the meaning of 42 U.S.C. § 1983, the defendants in these cases were considered to be federal employees, and the question of § 1331 jurisdiction over a municipality created under state law, such as the City of Los Angeles, was not discussed.

McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th Cir. 1976), cert. denied, 429 U.S. 855 (1976)(action for violation of civil rights under color of federal law.)

Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977) (no public entity defendant involved in case; § 1331 jurisdiction not discussed);

Cleveland v. Albaugh, No. 78-224 (6th Cir. 1978) 577 F.2d 740 (No published opinion; petitioner's citation of this decision violates spirit, if not letter, of Sixth Circuit Rule 11 forbidding citation of decision not designated for publication);

Brault v. Town of Milton, 527 F.2d 736 (2d Cir. 1975) Court en banc declines to resolve Fourteenth Amendment issue);

Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975) (jurisdiction over municipality not determined; claim was time-barred);

Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971) (no state defendants present; § 1331 jurisdiction not discussed);

Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (§ 1331 jurisdiction asserted in reliance upon Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975), without recognition that the Second Circuit sitting en banc declined to resolve the jurisdiction issue at 527 F.2d 736).

(B) Decisions Asserting Juridsiction Under Section 1331 Based On The Monell Theory

When this Court ruled in Monell v. New York City Dept. of Soc. Serv., ___U.S.___, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) that a municipality was not immune from suit under 42 U.S.C. § 1983 for the enforce-

ment of an unconstitutional policy, the primary justification for asserting jurisdiction over a municipality under § 1331 disappeared.

Consequently, with respect to the instant case, in which no unconstitutional policy of the City of Los Angeles is alleged to exist, decisions asserting jurisdiction under § 1331 represent simply an application of the Monell doctrine and are not authority establishing § 1331 jurisdiction over the City of Los Angeles in this case.

Thus the following cases cited by petitioner are not truly in conflict with the decision below:

Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977) (personnel policy resulting in discharge of police chief);

Hostrop v. Bd. of Jr. College Dist., 523 F.2d 569 (1975), cert. denied 425 U.S. 963 (1976) (dismissal of junior college president without notice and hearing);

McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1977) cert. denied 434 U.S. 966 (1977) (§ 1331 jurisdiction lacking because no attack on allegedly

unconstitutional county policy);

Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977) (§ 1331 jurisdiction lacking because no attack on allegedly unconstitutional city policy);

Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975) (jurisdiction exists for challenge to hospital policy);

Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975) (jurisdiction exists for challenge to allegedly unconstitutional building inspection policy);

Roane v. Callisburg Independent School Dist., 511 F.2d 633 (5th Cir. 1975) (employee termination without hearing and without good cause);

Matherson v. Long Island State Park Comm'n, 442 F.2d 566 (2d Cir. 1971) (commission policy of discouraging the public from patronizing plaintiff's night spot);

Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977) (teacher denied tenure and discharged);

Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir.

1974) (complaint alleged that "taking" resulted from City ordinance).

(C) Decisions In Which The Section 1331 Ruling On Jurisdiction Is Dictum

Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976) (reversed for determination whether plaintiff could amend to satisfactorily allege § 1331 jurisdiction);

Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977) (municipality conceded § 1331 jurisdiction);

Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977) (§ 1331 jurisdiction asserted, but solely for the purpose of permitting adjudication of pendent state claim in preference to resolving the "difficult constitutional question" whether a remedy under the Fourteenth Amendment may be implied against a municipality);

Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976) (remanded for determination of jurisdictional amount; also,

"taking" of property by City without due process supports jurisdiction under Monell).

(D) One Decision Apparently In Conflict With The Ruling Below

Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975) cert. denied, sub-nom. Afro-American Patrolmen's League, Inc. v. Conlisk, 424 U.S. 912 (1976) (ruling is weakened by its express reliance upon City of Kenosha v. Bruno, 412 U.S. 507 (1973) as "indicating jurisdiction over a city could be established under" § 1331; Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977), expressly said that the question had never been resolved by this Court.)

In summary, it appears that petitioner has grossly overstated the extent to which the various circuit courts of appeals are in conflict on the issue raised in the petition. Of the 26 cases cited by petitioner to demonstrate the supposed "conflict," only one is truly in conflict -- and that case is questionable for its reliance on Bruno, which

was reinterpreted in Mt. Healthy.

The remaining 25 cases either do not address the issue of jurisdiction under § 1331 over a municipality, or raise the issue only in the context of an unconstitutional policy -- a situation now provided for by Monell and not present in this case -- or merely discuss the issue in dictum and do not reach a square holding on the issue.

Consequently the conflict among the circuits is minimal and does not justify a grant of the petition for certiorari.

II

THE LACK OF JURISDICTION OVER THE CITY OF LOS ANGELES DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION ON THE RECORD OF THIS CASE

To obtain a grant of certiorari, petitioner should show how the jurisdictional relief denied him by the Ninth Circuit Court of Appeals would have improved his prospects as a litigant so that a substantial federal question is created. However, petitioner has failed to make such a showing.

A. Petitioner Failed To Show That His Ability To Recover On His Judgment Is Impaired By The Lack of Jurisdiction Over the City

Because the City of Los Angeles is compelled by the law of California to pay any judgments rendered against its employees for conduct in the course and scope of their employment, petitioner is guaranteed to obtain his recovery in this case and he suffered no detriment at any point in the litigation attributable to the absence of the City of Los Angeles as a party formally named as a defendant.

California Government Code § 825 requires the City to pay a judgment against an employee by providing in part:

> If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment . . . the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which

the public entity has agreed.

This statute guarantees that the City of Los Angeles shall pay the judgment in the case at bar. Petitioner has not suggested that the case at bar falls outside the terms of this statute because, for example, the police officers were acting outside the course and scope of their employment. Moreover, the California Supreme Court has specifically held that indemnification of the employee by the public entity for a civil rights judgment is compelled by the Government Code statutes.

Williams v. Horvath, 16 Cal.3d 834, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976).

Consequently, petitioner's ability to recover on his judgment is not in jeopardy merely because the City of Los Angeles was not formally subject to the jurisdiction of the district court.

B. Even if the City Were Subject To the Court's Jurisdiction Under Section 1331, Petitioner Has Not Shown Any Wrongdoing of the City That Would Create Liability Against The City, and Respondeat Superior Does Not Support Liability in Civil Rights Litigation

Even if the district court had jurisdiction over the City under § 1331, petitioner has failed to show how such jurisdiction would benefit him, for he has not demonstrated facts upon which the liability of the City could be established.

There was no evidence of wrongdoing by the City, other than the conduct of its two officers. Consequently, liability of the City for the conduct of its two officers could be predicated only on a respondeat superior theory, and that theory has been consistently rejected in civil rights litigation, wherein each defendant is liable only for wrongdoing in which he or she was personally involved. The respondeat superior theory is not a basis of liability for a civil rights violation. See e.g.:

Jennings v. Davis, 476 F.2d 1271, 1274-1275 (9th Cir. 1973);

Taken Alive v. Litzau, 551 F.2d 196, 199-200 (9th Cir. 1977);

Gambling v. Cornish, 426 F.Supp. 1153 (N.D. Ill. 1977);

Delaney v. Dias, 415 F.Supp. 1351 (D. Mass. 1976);

Bur v. Gilbert, 415 F.Supp. 335 (E.D. Wis. 1976);

Everett v. City of Chester, 391 F.Supp. (E.D. Pa. 1975);

As this Court said in Monell, the legislative history compels the conclusion that Congress did not intend municipalities to be held liable "solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." 56 L.Ed.2d at 636.

Petitioner has advanced no grounds for permitting a municipality to be subject to respondeat superior liability under § 1331 when such liability cannot be established under the specific statutory

provision established by Congress to remedy civil rights violations, 42 U.S.C. § 1983.

In summary, petitioner's failure to explain why the City should be subject to district court jurisdiction under § 1331 reveals that no substantial federal question is present in this case and therefore the petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondents urge that the petition for writ of certiorari be denied.

Respectfully submitted,

BURT PINES, City Attorney
JOHN T. NEVILLE,
Sr. Assistant City Attorney
MICHAEL K. FOX
Deputy City Attorney
By DANIEL U. SMITH
Deputy City Attorney

Attorneys for Respondents